No. 16,184

IN THE

United States Court of Appeals

For the Ninth Circuit

ARTHUR KING WILSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California.

REPLY BRIEF FOR APPELLANT.

SPURGEON AVAKIAN,
J. RICHARD JOHNSTON,
H. HELMUT LORING,
First Western Building,
Oakland 12, California,
Attorneys for Appellant.

KOERNER, YOUNG, MCCOLLOCH & DEZENDORF,
Pacific Building, Portland 4, Oregon,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Table of Authorities Cited

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Appellee seeks to circumvent the trial court's refusal to reconsider the evidence and to set forth findings of fact by urging (1) that the remand was for the purpose of having the trial judge determine "whether or not the trial judge had the proper principles of law in mind at the time of his original decision" (Br. for U.S., p. 10; see also pp. 7, 8), and (2) that the requirement of factual findings was intended to apply only if the trial judge concluded that he had initially applied the wrong principles of law. (Br. for U.S., p. 17; see also pp. 7, 14-15.)

But this argument is apparently not offered with any great confidence, for Appellee also contends (Br. for U.S., p. 16) that the trial judge *must be assumed to have reviewed the trial record,* notwithstanding the trial judge's emphatic statement on two occasions that he would not and could not "redetermine the guilt or innocence of the defendant on the record" (R. 124) or "render a new decision on the same facts two years after the event." (R. 121.)

Appellee has nimbly shifted its position since the remand hearing without even a blushing reference to the inconsistencies between its present arguments and its former ones.

On the prior appeal (No. 15,301), Appellee, in its Petition for Rehearing (p. 11; for pertinent portion, see Brief for Appellant, p. 23), argued against the time and expense of a retrial, and urged instead that the trial judge could *"reappraise the evidence"* and, *"having the record before it,"* could make special findings under Rule 23 to clarify *"the factual basis"* upon which the existence of wilful intent was determined. (Italics added.)

During the remand hearing, Appellee specifically stated, as its interpretation of the mandate, that the trial court was under instructions to reconsider the evidence for the purpose of making findings (R. 87), that the facts had to be reviewed to see whether or not they made out the requisite intent (R. 90), that the court should relate its finding to the significant pieces of evidence upon which the finding was based (R. 124), that the Court of Appeals had in effect

made a motion for special findings under Rule 23 on behalf of Appellant (R. 126), and that the mandate called for special findings *"whether or not new evidence was introduced."* (R. 134, italics added.)

Appellee *now* contends that "the mandate called for an initial determination by the trial judge as to whether or not he had applied the proper principles of law to the facts in making his original decision," and that, if the trial judge concluded that he had originally applied the correct law, the making of factual findings would be "the tedious and useless labor of an idle act" which "this Honorable Court will not and did not require the trial court to perform." (Br. for U.S., p. 17.)

To support this construction, Appellee erroneously states that this Court "held that the trial court *probably* did not use the proper standards of law." (Br. for U.S., p. 14, italics added.) In fact, the decision of this Court declared that this was a case in which the trial court's views were set forth "with certitude and clarity", and were "clear statements . . . expressed on numerous occasions." (R. 24.) Moreover, the Court took the trouble to set forth at considerable length, in footnote 13 of its opinion (R. 25-30), some of the statements of the trial judge which clearly and unequivocally show that the trial judge had specifically rejected the very legal principles which this Court held applicable.

The purpose of the mandate was not to have the trial court exercise appellate review of this Court's

decision, but to implement that decision by having the trial court *reappraise the evidence and make special findings,* as specifically requested by Appellee in its Petition for Rehearing, rather than having a complete new trial. The provision in the mandate for presentation of additional evidence by the Government was no doubt prompted by the possibility that the Government, in reliance on the erroneous rules of law stated by the trial court during the trial, might not have presented all of the available evidence bearing on intent.

It is clear that the trial judge did not reconsider the evidence, notwithstanding Appellee's effort to assume the contrary. The trial judge was quite frank in saying that such reconsideration was impossible, and he repeated this with considerable emphasis in response to the efforts of Appellee's Counsel to patch up the record by suggesting that the trial judge had meant to say that his recollection had faded only as to "minor details and . . . analyses of . . . documents." (R. 121, 122-3, 124.) There is nothing to the contrary in the written Opinion, Findings and Decision. (R. 78-82.) Indeed, the Opinion shows that the finding of intent is based on the trial judge's reasoning that, since he considered that he had always held to the correct rule of law, he would not originally have found Appellant guilty without convincing evidence of evil intent. (R. 79-80; see also the trial judge's explanation of the first decision at R. 138.) This is a far cry from a reconsideration or reappraisal of the evidence.

The belief expressed by the trial judge during the remand hearing that he had "never had any contrary views to that stated by the Court of Appeals with respect to the necessity of tax evasion motive and wilfulness being present," and that he had "never indicated anything to the contrary" (R. 121-2) corroborates the dimness of his recollection of the trial. The statements of the trial judge quoted in the opinion on the prior appeal (R. 25-30) need not be repeated here, beyond mentioning that, even at the end of the trial, the judge reiterated his view that the requirement of evil intent which applied in income tax evasion cases was not present in withholding tax cases.

The trial court's confessed inability to reconsider evidence heard two years earlier was not, of course, contemplated by this Court when it remanded the case for that purpose (nor, obviously, by appellee when it suggested such a remand). The Court's reliance on *Communist Party v. Subversive Activities Control Board,* 351 U.S. 115 (1956), in denying appellant's Petition for Rehearing (R. 38; 254 F. 2d 391) shows that the Court had in mind a reconsideration of the evidence, and the making of specific findings. In that case, the matter was remanded for consideration of certain claims regarding perjured testimony. The decision states that, whether the challenged testimony was sustained or discredited on the remand hearing (351 U.S. at 125),

> "In either event, the Board must then reconsider its original determination in the light of the rec-

ord as freed from the challenge that now beclouds it."

Similarly, the manner in which this Court distinguished the cases cited in our Petition for Rehearing shows that the remand contemplated a reconsideration of the facts. In its discussion of those cases, the Court emphasized the propriety of a partial remand to take additional evidence and to make findings based on the combination of the old record and the new one.

Moreover, even if the situations were otherwise similar (which it is now clear they are not), the *Communist Party* case involved an administrative proceeding and would not set the standards of due process required in criminal trials.

Appellee's effort (Br. for U.S., p. 18) to preclude consideration of the propriety of the remand by raising the doctrine of "law of the case" misconceives the nature and effect of that legal principle. The doctrine has no application where new elements which did not appear on the former appeal are shown; and the significant new circumstance here is the trial judge's confessed inability to reconsider the evidence. *Insurance Group Committee v. Denver and Rio Grande W. R. Co.,* 329 U.S. 607, 611-3 (1947).

Moreover, this doctrine simply expresses a practice, and is not a limitation on the reviewing Court's power. *Messinger v. Anderson,* 225 U.S. 436, 444 (1912). There is nothing to the contrary in *Fisher v. U.S.,* 254 F. 2d 302, 304 (9th Cir. 1958), upon which

Appellee relies, since the Appellate Court in that case actually reviewed the merits of its prior ruling before deciding to adhere to it.

Appellee also invokes the "law of the case" doctrine on the issue of the sufficiency of the evidence (Br. for U.S., pp. 19-20); but the doctrine applies only to matters actually determined on the prior appeal, and, clearly, there was no holding on that issue, since the judgment was set aside and the case remanded for reconsideration of the evidence. Even the authorities cited by Appellee do not support its position. In *Marron v. U.S.,* 18 F. 2d 218, 219 (9th Cir. 1927), the rule is stated as follows:

> "Where the evidence is the same, and the charge identical, a final decision on appeal establishes the rule, or law of the case, which will govern the second trial."

It seems strange that Appellee, having shown familiarity with the "law of the case" doctrine, nevertheless ignores it as to the one point to which it does apply—namely, the holding that the first judgment was based on an erroneous rule of law.

What is involved here, in substance and effect, is a continuance of two years in a criminal trial, followed by a resubmission of the record to the trier of facts. That of itself would appear to be improper. See *United States v. Alker,* 260 F. 2d 135, 159 (3rd Cir. 1958), where a delay of two months was termed "hardly . . . commensurate with the minimal standards. . . ."

But here the trier of the facts frankly confessed inability to reconsider the record. What was contemplated by the remand was considered impossible by the trial court.

Accordingly, the judgment should be reversed.

Dated, February 5, 1959.

Respectfully submitted,

SPURGEON AVAKIAN,
J. RICHARD JOHNSTON,
H. HELMUT LORING,
Attorneys for Appellant.

KOERNER, YOUNG, MCCOLLOCH &
DEZENDORF,
Of Counsel.